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Supreme Court, U.S.
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**IN THE**
***SUPREME COURT of the UNITED STATES***

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Janice Jones, In Propria Persona, Sui Juris

Petitioner,

vs.

DANNY PAUL ROBINSON, AND
MECOSTA COUNTY

ET ALII,

Respondent.

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On Petition for Writ of Certiorari
To The United States Court of Appeals for the 6th Circuit

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**PETITION FOR WRIT OF CERTIORARI**

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Janice Jones,
Petitioner
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## QUESTIONS PRESENTED

I. Whether The District Court Judge erred in granting summary judgment for Respondents when there was sufficient material facts and evidence in the record which presented a sufficient disagreement to require submission of Petitioner's case below to a jury?

II. Whether the Appellate Court erred in affirming the District Court's grant of summary judgment for Respondents when there was sufficient material facts and evidence in the record which presented a sufficient disagreement to require submission of Petitioner' s case below to a jury?

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## JURISDICTION

The Order of the 6th Circuit Court of Appeals denying Petitioner's Appeal was issued June 17, 2002. This Petition is being filed within 90 days of that Order.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) & § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Petitioner's 5th, 7th and 14th Amendment rights to due process of law and right to trial by jury:

**Amendment V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Amendment VII**

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

**Amendment XIV**

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## SUMMARY OF THE ARGUMENTS

The district Court erred in a gross abuse of discretion in granting the Respondent's Motion for Summary Judgment because there were many material facts in dispute between the parties, including, but not limited to, whether the Respondent Danny Paul Robinson ("Robinson") merely touched the Petitioner, or as she testified, he violently seized her, deliberately placing her in excruciating pain; or whether the incident was 1 or 2 seconds as proposed by Robinson; or up to a 2 minute violent seizure as asserted by the Petitioner and also witnessed by the Petitioner's mother, Loretta. Moreover, Robinson and the district Court refused to acknowledge that this incident was comprised of two separate and distinct occurrences resulting in the violent seizure of Petitioner.

The district Court Judge admonished the Parties to behave and cooperate with one another in the discovery process and the Petitioner clearly obeyed. Robinson on the other hand, continued his uncooperative behavior in refusing to answer questions which the trial judge had previously ordered him to answer in his re-deposition. As a result, Petitioner was improperly and unfairly punished for Robinson's continued refusal and failure to obey the trial Judge's orders.

Deputies Nielsen and Miller's untimely affidavits, coupled with the unsigned police reports, were insufficient grounds for the district Court to grant Respondent's Motion for Summary Judgement. Therefore the District Court Judge's ruling granting the Respondent's Summary Judgment was an error of abuse of discretion and Petitioner was prejudiced thereby.

## STATEMENT OF THE CASE

This action arose out of an incident that occurred on or about July 12,1998, at the Mecosta County Sheriff's Department in Big Rapids, Michigan, while the Petitioner was inside the Sheriff's Department (hereinafter "Department" ). At the time of the incident, Petitioner and Loretta Jones, Petitioner's Mother, (hereinafter "Loretta") had been humane society volunteers as a community service. Loretta had contacted the Department regarding a cat that was rescued and presumed to have been abandoned, or a "wild Cat" that had gotten into a residence in Big Rapids.

The person, Elizabeth Owczarzak, who knew the caretaker of the house where the cat was located and who rescued the cat, had given it to Loretta because she was unable to hold it until the circumstances surrounding the cat's status could be looked into. Ms. Owczarzak felt the cat would have died had it not been removed from the house. Loretta contacted the Department and was informed to wait until Monday (the next day) to speak with the Sheriff. In the meantime a deputy called Loretta back and requested her to come to the Department with the cat.

Petitioner accompanied Loretta to the Department, and upon arrival, they were met by a Deputy Nielsen, who showed them to the interview room. Loretta explained to Deputy Nielsen that the subject cat was in a great amount of distress, suffering from lack of nourishment and needed to be seen by a veterinarian. In Sheriff Sonntag's Deposition, when asked if it was Mecosta County's policy not to deal with situations involving cats, he replied, "That's the County policy; Yes, it is." (D.E. 59, Pg. 7, line 2) Deputy Nielsen did not ask Loretta what happened or how the cat came into her custody. Petitioner had been asked by Loretta to accompany her to the Department and it was Loretta who was handling the situation from the

beginning. Deputy Nielsen expressed his concern, without inquiring or taking a statement from Loretta as to how Loretta obtained the cat. An "S" was written on Deputy Nielsen's form indicating the cat had been stolen, when in fact it had not. However, Deputy Nielsen never questioned Petitioner or Loretta to verify the details of their version of the events. The primary witness and the one who rescued the cat, was not interviewed until approximately 2 weeks later. Deputy Nielson photographed the cat and, although he is not a veterinarian, stated the cat looked fine, but was rather thin. Because of the Officer's unwillingness to address the events, Loretta asked to speak with the on call Prosecutor at Deputy Nielsen's behest. Deputy Nielsen then left the room and returned with Deputy Robinson, who was the Animal Control Officer. Deputy Robinson, also without inquiring of Petitioner and Loretta, advised Loretta that the cat was stolen and ordered Deputy Nielsen to take the cat into custody. It was later learned that the owner of the cat had left the cat in the house without informing anyone, even the caretakers were unaware of the existence of the cat. The caretaker thought the cat was a stray that had somehow gotten into the house. Petitioner left the interview room in silence and went to the pay phone in the lobby to phone the Chairperson of the County Commission, as the Commissioners are responsible for supervising their employees. After getting through to an answering machine Petitioner left a message that they were having problems with the Sheriff Department personnel and to call her at the Department. By this time Loretta came out into the lobby.

As Petitioner and Loretta were returning to the Interview room to continue discussions with the Officers, suddenly and without words or warning, Deputy Robinson, rushed from behind a door over to Petitioner and forcefully grabbed her by the right upper arm and slammed her against the closed interview room door, and pinned her there. Distressed and

anguished by her daughter's terror brought upon by Robinson, Loretta cried out for her release, but Robinson refused and continued his illegal seizure by forcefully pinning and holding Petitioner against the door. Petitioner, now in excruciating pain from Robinson's use of Police Tactical pressure points and completely under his control, demanded her release. In response, Robinson simultaneously let go his release on Petitioner and opened the Interview room door, looked inside and held it ajar with his foot. Petitioner, off balance, stunned, shaken and faint, reached over and grabbed hold of the door to catch herself, as there was nothing else to hold onto. In response to this, Robinson again violently grabbed Petitioner's arm and pulled it off the door. Petitioner told Robinson she wanted to file assault charges against him. Robinson, brandishing a smirk, replied, "I didn't touch you!" denying the entire incident had ever even occurred, although there were numerous eyewitnesses to the event, including Loretta, who witnessed and testified under oath to the entire incident.

Officer Miller, who arrived after the entire incident was over and asked what happened. After Petitioner, Loretta and Robinson gave there versions of the incident, and Petitioner showed the injuries she sustained from the violent altercation, Officer Miller announced that he was powerless to do anything, because he did not observe anything. Petitioner then went quietly to the pay phone to call the Prosecutor for help. Officer Miller then rushed over, and forcefully slammed the phone lever down, grabbed the phonebook in such a way and with such force, as to tear the pages, leaving Petitioner extremely shaken and frightened from his display of uncontrolled anger and rage. In addition to the illegal conduct of Officer Robinson, he and others filed false statements in their police reports to cover for Robinson's illegal actions, a fact in dispute and one which could have been proved up in discovery, had the district Court permitted it to continue.

## ARGUMENT I

**The District Court Judge erred in granting summary judgment for Respondent when there was sufficient material facts and evidence in the record which presented a sufficient disagreement to require submission of the case below to a jury.**

Petitioner's sole claim in the case below was for deprivations of her Fourth Amendment right against unreasonable seizure. The Court entered an order precluding Petitioner from presenting any claim for personal injury, pain and suffering, emotional distress or mental anguish. This order was entered because Petitioner had previously voluntarily withdrew those claims from her Complaint. The reasons she withdrew them were a direct result of the depth in which the Defendant was deliberately delving into Petitioner's private life as a means of harassment. Therefore Petitioner will focus her argument of this issue within the four corners of the incident relating to the violent seizure of Petitioner by Robinson at the interview door.

The Trial Court improperly interpreted the credibility of the parties and witnesses relating to the interview room door incident in coming to his conclusion that no 4th Amendment violation occurred and thereby deprived Petitioner of a trial by jury on those matters, as follows:

Robinson states in his Police Report that he grabbed Petitioner's arm and removed it from the interview room door in order to prevent her from going into the interview room and to prevent her hand from getting caught in the door. See Robinson's Police Report attached to Complaint (DE 1), to wit:

> "As Officer MILLER was talking to Loretta and Janice JONES, this officer was standing back by

the interview room door at which time Janice broke for the interview room with the intention to grab the stolen cat and make off with it. Janice JONES grabbed the door to the interview room ... ." R/O put his foot in front of the door and put my right hand on the top of the door above her hand, holding the door into position prohibiting her from gaining entrance to the room. Ms. Janice JONES had her fingers wrapped around the door. If the door was to close on her fingers in the door case, she would suffer some serious in jury. R/O grabbed her arm with her fingers wrapped around the door and pulled it away from the door slamming the door shut and standing in front of it to prevent her from having entry into the room.

As soon as R/O touched Janice JONES, she started screaming that she had been assaulted."

In Robinson's Deposition, Petitioner asked him if he had control of her and intended to prevent her from doing something when he placed his hands on her. In his response, Robinson completely omitted the first violent seizure of Petitioner and also denied that he had control of Petitioner in the second violent seizure. In his words, he alleged that he was only preventing Petitioner from personal injury and keeping her fingers from being caught in his violent slamming of the door, to wit: (beginning at page 12, Line 25 and ending on 13, Line 16 of Robinson's Deposition (DE 58 and /or 23))

Q: Did you have control over my person when you placed your hands on me?

A: No.

Q: For the period of time you placed your

hands on me, no matter how short or how long, could I escape your grasp?

A: You did, yes.

Q: So what did I do?

A: You pulled your hand away.

Q: Was it your intent to prevent me from doing something when you placed your hands on me?

A: No, other than get your fingers smashed in the door.

Q: And did you place your hands at any time on me prior to that incident?

A: I don't believe so. We've met several times, but I don't –

Q: No, that day.

A: Oh, no.

However, Robinson contradicts himself in other parts of his deposition regarding his reasons for placing his hands on Petitioner and he admits that he was trying to prevent Petitioner from taking the cat, to wit:

Q: What is the arrest procedure of the sheriff's department? (page 28, Line 6)

A: If it's something that's committed in our presence, we advise them of it, you know. (page 28, Line 19)

Q: Did you omit any actions that you took against me that you didn't put in your report? (page 44, Line 1)

A: I don't believe I did. The only thing that I can tell you is that I prevented you from gaining entrance to the room, and I removed your hand because I was afraid it was going to get smashed in the door.

(page 4, Line 6)

Q: And what made you feel I was trying to gain entrance to the room? (Page 44, Line 10)

A: Because you told me you were going to. You were going to get the cat and leave. (page 44, Line 12)

Q: I don't believe that was said. (page 44, Line 14)

Q: Did there come a time when you placed your hands on me? (page 10, Line 14)

A: Yes. (page 10, Line 15)

Q: And why did you do that? (page 10, Line 16)

A: Because I was afraid that you were going to be injured by the door. (page 10, Line 17)

Q: And what were all these people - where were - theses people that you named, where were they when you grabbed my arm? (page 25, Line 4)

A: I think your mom and Officer Miller were standing about center lobby. And I don't believe - you know, I was over by the door or you were headed towards the door and I went over and stopped you from gaining entrance to the interview room. (page 25, Line 9)

Q: And what made you think I was trying to gain entrance to the interview room? (page 25, Line 14)

A: Because you told me your were going to go get the cat. (page 25, Line 16)

Conversely, the Petitioner states in her affidavit (see Affidavit of Janice Jones (DE 22)) that Robinson violently grabbed her and pinned her against the door, a material fact that Robinson denies which goes directly to Petitioner's claim of being falsely detained/arrested/seized, to wit:

> "Suddenly, without words or warnings and unprovoked by me, Mr. Robinson rushed at me from an unknown location. (I did not see him, nor was I aware that he was coming at me) He then violently and forcibly seized my right upper arm. He violently and forcibly slammed me against the closed interview room door. Mr. Robinson then had me pinned up against the closed interview door. He continued to push and shove me with such force that I could not escape from his force against me or his tight grip." (Affidavit of Janice Jones)

When construed in a light most favorable to Petitioner, it can reasonably be inferred from Petitioner's deposition testimony, Affidavit and Loretta Jones' Affidavit(DE 22), that she was the victim of Robinson's unprovoked attack upon her.

> "Suddenly without words or warning, Danny Robinson, Animal control Officer, came out of the East Lobby door, rushed over to Janice, grabbed her forcefully and violently pushed Janice pinning her up against the interview room door. She was immobilized, looked in shock and began

screaming, as anyone would when being attacked. Janice really struggled with Robinson. He had her arms in the air. I could not believe what I was witnessing. I looked around in desperation for somebody to help her. Janice is a petite woman of small stature (5', 1") and 110 lbs. while Danny Robinson is approximately 6' tall and 200 lbs! Janice naturally tried to defend herself by screaming at Robinson to leave her alone, not to touch her, and to get away.

Janice then lost her balance in the struggle with Robinson that pursued. She grabbed hold of the edge of the interview room door that Robinson had opened to look inside. That was the only thing she had to hold onto, to restore her balance. Then Robinson took Janice's arm and removed her hand from the edge of the door. It was extremely difficult for me, as a mother, to have to witness such brutality on the part of an Animal Control Officer. There are better ways to properly conduct himself. Robinson then put his foot in the interview room door and was peering in there for a while. He was peering in there as if watching something. I kept calling Janice's name and motioning t her to get away from Robinson, I was approximately 3 ft. behind them and witnessed the entire confrontation." (Affidavit of Loretta Jones)

The district court applied an incorrect standard in dismissing Petitioner's deposition testimony, Affidavit and witness testimony as insignificant and insubstantial. Rather than drawing all inferences from the evidence provided by Petitioner

in her favor, the district court weighed the evidence and determined that Petitioner's version was not as credible as Robinson's. "At the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). It is clear that in reaching the conclusions that it did, the district court veered from this standard. While making ample and frequent references to Robinson's version of the case, the District Court failed to consider Petitioner's only eye witnesses' Affidavit in its findings.

However, even if it were determined from Petitioner's evidence that Robinson's unprovoked attacked on her happened much the way she and her witness describe it, there is still a question of whether that represents a sufficiency of direct evidence to raise a question of material fact regarding Robinson's motivation behind the incident. The District Court couched Petitioner's allegations that, "He then violently and forcibly seized my upper arm. He violently and forcibly slammed me against the closed interview room door" as a "touch", raises a question of material fact regarding the motivation of Robinson and it was error for the district court to grant him summary judgment on the § 1983 claim.

Obviously, from the record of testimony, the incident here in issue did not evoke the specter of law enforcement personnel clubbing, kicking, punching, or brutally beating a bleeding plaintiff, or even threatening her with weapons or physical bodily harm. It was a violent seizure that resulted when Robinson, under the pretext of attempting to keep Petitioner from entering the interview room, violently attacked and seized her which caused her to lose her balance and take hold of the interview room door which resulted in Robinson forcibly prying

her fingers from the door.

In determining if the force used to effect a particular seizure is reasonable, "Fourth Amendment jurisprudence has long recognized that the right to make an arrest . . . carries with it the right to use some degree of physical coercion or threat" of physical force to effect custody. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citing *Terry v. Ohio*, 392 U.S. 1, 22-27 (1968)). However, Robinson was not in the process of arresting Petitioner and indeed he had no legal grounds to seize her, or even touch her in any manner whatsoever. It is undisputed by the record that there was no present danger to the public rising to a level of any need to restrain the Petitioner physically. Even construing Robinson's version of the incident in a light most favorable to him, had he left Petitioner alone and she had gone into the interview room and taken the cat, Robinson would have then had grounds to arrest the Petitioner and use any necessary force to effect her arrest. Instead, according to Petitioner, Robinson's rage toward Petitioner and Loretta was the sole grounds for his behavior in his violent attack on Petitioner.

The Supreme Court has stated:

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight... With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation." *C.f. United States v. Place*, 462 U.S. 696, 703 (1983); *see also, Neague v. Cynkar*, 258 F.3rd 504 (6th Cir. 2001)

As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "OBJECTIVELY REASONABLE" in light of the facts and circumstances confronting them, without regard to their underlying intent of motivation. In this case, Robinson's actions in attacking Petitioner were clearly not objective or reasonable.

In this case, the facts are disputed as to WHETHER ROBINSON MERELY TOUCHED PETITIONER, OR VIOLENTLY GRABBED HER, DELIBERATELY PLACING HER IN EXCRUCIATING PAIN, OR WHETHER THE INCIDENT WAS 1 OR 2 SECONDS AS PROPOSED BY ROBINSON, OR UP TO A 2 MINUTE VIOLENT ATTACK AS ASSERTED BY PETITIONER AND LORETTA. In any event, Robinson's and Petitioner's versions of the facts create a distinct material fact for submission to a jury. Although the right to be free from excessive use of force is clearly established, there is a genuine issue of material fact here as to whether the officer in fact used excessive force. Therefore, the district court's finding of qualified immunity for Robinson, was error.

Moreover, the District Court opined that Police Officers have authority to maintain order inside the police station and prevent individuals from taking property in police possession which they have reason to believe may have been stolen from its owner.

Conversely, Petitioner asserts that the Police knew the cat was not stolen and that they were using the pretext of the cat being stolen as grounds to harass and charge false crimes against the Petitioner and Loretta. For example, Robinson's friend in the adjoining County, Osceola County Dog Warden Alan Benson, had three(3) years earlier violently assaulted, battered, and injured Petitioner's 69 year old mother, Loretta. Robinson was bullying Petitioner and her and used his authority under color of law to physically attack Petitioner. Robinson's and Petitioner's

versions of the events and the incident are clearly substantial material facts which require submission to a jury and not a matter for the opinion of the District Court Judge.

There are also a number of conflicting material facts brought forth even by Robinson which require submission to a jury for determination. In deposition Robinson stated that he was told by Petitioner that the reason she was going into the interview room was to get the cat and leave. Petitioner emphatically denied this. Petitioner was returning to the Interview Room after placing a call to the County Chairperson's answering machine. Petitioner asked Robinson if he omitted any actions he took against Petitioner that he didn't put in his report and he replied, "no" and that his reason for preventing Petitioner from gaining entrance to the room and removing her hand was because he was afraid it [Petitioner's hand] was going to get smashed in the door. Also when Petitioner asked Robinson his intent in preventing her from doing something when he placed his hands on her, he replied that it was only to prevent Petitioner's fingers from being smashed in the door. Robinson's explanation was a blatant lie designed to cover up his unlawful conduct in violently seizing Petitioner.

As an initial point of clarification, Petitioner objects to the Respondent's felicitous use of certain words and terminology in their Brief in describing Respondent Robinson's actions against the Petitioner as a mere "touching" and the use of the term "stolen cat" and the district Court's acceptance and use of that description. Such words and terms were designed by the Respondents and used of their own volition to mislead and deliberately down play the actual factual circumstances of this case and the Petitioner hereby unequivocally rebuts the use of those words and terms as a self serving tactic on the part of the Respondents to improperly describe those events and giving the appearance to the reviewer that this case is insignificant, when in reality the contact by Robinson with the Petitioner was violent

and extremely painful for Petitioner.

The cat in this case was never stolen, never reported stolen, never ruled as stolen, nor was the Petitioner ever charged with any criminal behavior. That the Respondents would have the Court believe that the Petitioner, a person of extremely moderate means, has undertaken the entirety of a complex Title 42 action on her own, beginning on July 12, 2000, and continuing until present, some twenty-six (26) months, because Officer Robinson "touched her" for 1 or 2 seconds is ludicrous and preposterous.

Officer Robinson admitted in his official police report of the incident that he grabbed Petitioner's arm, pulled it away from the door and slammed the door shut. Grabbing, pulling and slamming are hardly words used to describe a mere touching in anyone's vocabulary, to wit:

> "R/O grabbed her arm with her fingers wrapped around the door and pulled it away from the door slamming the door shut..." (DE 1)

In support of Petitioner's allegations that the Trial Court improperly accepted the Respondents' Motion for Summary Judgment out of time because the purported affidavits were not notarized until almost a month after they were signed and after the close of discovery, Fed.R.Civ.P. 6(d), Time, states in pertinent part that "...When a motion is supported by affidavit, the affidavit shall be served with the motion. ..." Rule 6 does not permit a party to file a partially executed affidavit and then when convenient, file the original.

In fact, Respondent's Counsel, Mr. Smith, noted in his cover letter for Respondents' Supplemental Brief in Support of Respondents' Counter-Motion for Summary Judgement (DE #62) that "Upon receipt of the original fully executed affidavits, we will file same with the court." By that logic it can be presumed

that the un-notarized affidavits were not fully executed. Moreover, those Affidavits were taken verbatum from the false police reports.

Moreover, in Fed.R.Civ.P. 55(e) Form of Affidavits, it states that "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." By this rule, the Trial Court's allowing the Respondents to enter their affidavits after the close of discovery denied Petitioner of due process, in that she was barred from responding to the Respondents affidavits with her own in opposition thereto, because of the inappropriate close of discovery by the district court. Rather than sanctioning Robinson and Smith for refusing to answer Petitioner's questions in a second court ordered deposition which Petitioner was forced to paid for, and also addressing the underlying perjury issues, the district court closed discovery.

Notwithstanding the legal insufficiency of the Respondents' Motion for Summary Judgement based upon the untimeliness of the affidavits, the District Court improperly granted the Respondents' Motion for Summary judgment on the basis of Qualified immunity. Qualified immunity *only* shields government officials performing discretionary functions from civil liability insofar as their conduct does not violate clearly-established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818; 102 S. Ct. 2727; 73 L.Ed. 396 (1982).

Taking the Petitioner's allegations in the light most favorable to her, it is clear that Robinson's conduct violated a constitutional right, that being the Petitioner's 4th Amendment

right to be secure from unreasonable seizures. Such a right is clearly established by the Constitution and Robinson knew his conduct was violative of the Petitioner's 4th Amendment right and chose in his defense to attack the Petitioner, which is evidenced by the record.

As sworn to by the Petitioner in her affidavit (DE # 22), after the seizure encounter described above, Robinson, contrary to his police report and other untimely affidavits, completely denied that he even made physical contact with the Petitioner whatsoever, to wit: "I didn't touch you" (DE #22).

Taking Petitioner's allegations as true:

> "...Mr. Robinson rushed at me from an unknown location... He then violently and forcibly seized my right upper arm. He violently and forcibly slammed me against the... door. Mr. Robinson then had me pinned up against the... door. He continued to push and shove me with such force that I could not escape from his force against me or his tight grip. Robinson slammed me so forcibly against the... door that I was in shock... Robinson then pulled my right hand off the... door as he was standing there holding it slightly open. I said to him that I wanted to file assault charges. To which he replied, 'I didn't touch you'...
>
> The force of being slammed so violently against the... door and his extremely tight grip on my arm caused me to suffer extreme pain for weeks. As a result of Robinson's actions, I suffered bodily strain, physical inconvenience, physical discomfort, mental suffering, embarrassment, humiliation, disgrace and injury to my feelings and reputation... being so violently

> slammed against the... door aggravated my pre-existing medical conditions. I recently had surgery on my hand."

One of the issues brought up by the Respondent is whether the seizure itself was reasonable under the circumstances. In *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), concerning whether the Fourth or Eighth Amendment standard applies to seizures, the Supreme Court stated:

> "Today we make explicit what was implicit in Garner's analysis, and hold that all claims that law enforcement officers have used excessive force--deadly or not--in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims." 490 U.S. at 395, 109 S. Ct. at 1871.

The Supreme Court evaluated more precisely the particulars of its chosen standard and provided helpfully specific guidance:

> "The "reasonableness" of a particular use of force must be judged from the perspective of a

> reasonable officer on the scene, rather than with the 20/20 vision of hindsight. (citations omitted) The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation."

As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. (citations omitted) An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional. 490 U.S. at 396-97, 109 S. Ct. at 1872. See also *Scott v. United States*, 436 U.S. 128, 137-39, 98 S. Ct. 1717, 1723-24, 56 L. Ed. 2d 168 (1978).

In the instant case, the Respondent alleges that the Petitioner was determined to enter the interview room to take away the cat which the police had (improperly and maliciously) determined to be stolen property and that Robinson had the duty to protect the property rights of a citizen. This is yet another in the myriad of facts disputed in this case. The Petitioner clearly stated throughout this case that she never intended or ever attempted to enter the interview room to take the cat which was never stolen, nor alleged by anyone but Nielsen and Robinson to be stolen.

It is important for this Court to understand the reasons behind the incident outside the interview room between Robinson and the Petitioner. Initially, the Petitioner and Loretta were in the interview room speaking with Deputy Nielsen

regarding the entire incident surrounding the cat. During the interview with Nielsen, the Petitioner then left the interview room to make a telephone call while Loretta waited in the lobby for her to return. After the completion of the telephone call, the Petitioner went back to the interview room to conclude her business with Nielsen and the cat. It was at that point where Petitioner was returning to the interview room that Robinson intervened and seized and attacked the Petitioner outside the interview room door under the guise that the Petitioner was attempting to go in the interview room and steal the cat. When Petitioner left the interview room, Robinson was present and knew that the Petitioner left and that she would return to conclude her business. Robinson laid in waiting for Petitioner's return and attacked her by surprise. Robinson's version that he was attempting to prevent the Petitioner from stealing the cat was a lie designed to cover truth that he attacked the Petitioner out of anger and frustration because Robinson overheard that the Petitioner was leaving the interview room to go over the Deputy's head and call the County Commissioners. Robinson's violent seizure of the Petitioner during the encounter was under any standard unreasonable. Robinson used tactical pressure points on Petitioner to deliberately inflict severe pain and suffering. Robinson's animosity toward Petitioner is abundantly clear in the record. (D.E. #23, Pg. 42, Line 16 through 25, et. sec.)

The reasonableness standard requires that law enforcement officers act within the totality of the circumstances surrounding the incident and the necessary force under the subjective reasonableness standard. Under anyone's lens, and considering the facts in the light most favorable to Robinson, an officer over 6 feet tall and weighing over 200 pounds encountering a frail 5 foot 1 inch, 115 pound 49 year old woman within the confines of the sheriff's department who allegedly is attempting to gain access into an interview room to take a cat which she herself had brought to the department as a result of a

request from Police, who by his own admission pulled and grabbed the Petitioner, couldn't have been reasonable under the circumstances. Moreover, in the light most favorable to the Petitioner, Robinson's violent and forcible seizure of Petitioner's arm, slamming her against the door and pinning her up against it while continuing to push and shove her with such force that she could not escape from his force or his tight grip was even more egregiously unreasonable. Under either scenario, based upon the totality of the circumstances, any reasonable officer would have warned the Petitioner first and then, at the most, ordered her to cease and desist, to wit:

> Q: What is the arrest procedure of the sheriff's department? (D.E. 58 and/or 23, pg. 28, Line 6)
>
> A: If it's something that's committed in our presence, we advise them of it, you know. (D.E. 58 and/or 23, pg. 28, Line 19)

It is not reasonable however, under either scenario, for Robinson to have used any force whatsoever against the Petitioner. This was not an incident where the public safety was of paramount concern, nor was there an imminent danger. This incident was contained within the confines of the sheriff's department where the law enforcement personnel outnumbered the citizens a hundred to one. In the unlikely event that the Petitioner would have completely ignored Robinson's warnings, then he could have used necessary force to legally arrest the Petitioner. The Police Officers of this country are not empowered summarily punish persons based upon their personal dislikes, that is not their function. If Robinson believed that a crime was about to be committed, that was sufficient grounds to make a lawful arrest. Robinson's version of the incident was nothing more than a felicitous ruse designed to cloak his illegal and

retaliatory violent conduct. Petitioner was not engaged in any conduct rising to the level of criminal activity. On the other hand, Robinson was clearly hiding previous wrongful conduct evidenced by his continuing refusal to answer questions in his re-deposition, under order of the court, regarding a previous employment related suspension.

Summary judgment is appropriate when the record reveals that there are no issues as to any material fact in dispute and the moving party is entitled to judgment as a matter of law, Fed.R.Civ. P. 56(c); *Hiney Printing Co. v. Brantner*, 243 F.3d 956, 959 (6th Cir. 2001); *Redding v. St. Edward*, 241 F.3d 530, 532 (6th Cir. 2001); *Parker v. Metropolitan Life Ins. Co.*, 121 F3d 1006, 1009 (6th Cir. 1997) (*en banc*). The standard for determining whether summary judgment is appropriate is whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,251-52(1986); *see Groner v. Golden Gate Gardens Apartments*, 250 F.3d 1039, 1043 (6th Cir. 2001); *Strouss v. Michigan Dep't of Corrections*, 250 F.3d 336, 341 (6th Cir. 2001); *Burnett v. Tyco Corp.*, 203 F.3d 980, 982 (6th Cir.), *cert. denied*, 531. U.S. 928 (2000). The court must consider all pleadings, depositions, affidavits, and admissions on file, and draw all justifiable inferences in favor of the party opposing the motion. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Wuthen v. General Elec. Co.*, 115 F.3d 400, 403 (6th Cir. 1997).

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[1] Plaintiff incorporated an affidavit into her February 27,2001 brief in support of her motion for summary judgment. Plaintiff's statements in her affidavit concerning physical and emotional injuries are precluded by plaintiff's responses during her March 9, 2001 deposition, statements plaintiff made on the record at the May 11, 2001 hearing, and the court's order of May 16, 2001.

The party moving for summary judgment bears the initial burden of pointing out to the district court that there is an absence of evidence to support the nonmoving party's case, but need not support its motion with affidavits or other materials 'negating" the opponent's claim, *Moore v. Philip Morris Companies, Inc.*, 8 F.3d 335, 339(6th Cir. 1993). Once the movant shows that 'there is an absence of evidence to support the nonmoving party' s case," the non-moving party has the burden of coming forward with evidence raising a triable issue of fact. *Celotex Corp. v. Catreu*, 477 U.S. 317, 323 (1986).

To sustain this burden, plaintiff may not rest on the mere allegations of her pleadings. Fed.R.Civ. P. 56(e); *Campbell v. Grand Trunk Western R.R.*, 238 F.3d 772, 775 (6th Cir. 2001); *Copekind v. Machulls*, 57 F.3d 476, 479 (6th Cir.1995). A party opposing a motion for summary judgment has the burden to come forth with requisite proof to support his legal claim, particularly where he has had an opportunity to conduct discovery. *See Cardamone v. Cohen*, 241. F.3d 520, 524 (6th Cir. 2001); *Noble v. Chrysler Motors Corp.*, 32 F.31 997, 999 (6th Cir.1994); *Street v. J. C. Bradford & Co.*, 886 F.2d at 1478-81. In so doing, plaintiff must set forth specific facts showing that there is a genuine issue for trial. FED. R. CIV. P.56(e); *see Mounts v. Grand Trunk Western R.R.*, 198 F.3d 578, 580 (6th Cir. 2000); *Kensu v. Haigh*, 87 F.3d 172, 175 (6th Cir.1996); *Brennan v. Township of Northville*, 78 F.3d 1152, 1156 (6th Cir.1996). Conclusory statements, unsupported by specific evidence to support a claim, do not meet this standard. *Kensu*, 87 F.3d at 175-76. Applying these standards, the district Court erred in granting defendants' motion for summary judgement.

## ARGUMENT II

**The Appellate Court erred in affirming the District Court's grant of summary judgment for Respondents when there was sufficient material facts and evidence in the record which presented a sufficient disagreement to require submission of Petitioner' s case below to a jury.**

Based upon a clear reading of the Appellate Court's opinion, it did not properly review the record base and simply rubber stamped the District Court's judgment.

Like the District Court, a number of facts were misinterpreted by the Appellate Court which, taken as a whole, lead to the unavoidable conclusion that it simply rubber stamped the District Court's opinion.

First, the Appellate Court 'opined that, "Deputy Robinson... grabbed her during a confrontation..." See order of Appellate Court in Appendix "A". This was not a simple confrontation. It was an all out violent assault, battery, and seizure of the Petitioner and her constitutional rights by a rogue officer.

Second, the Appellate Court opined that "Following the close of the discovery period established by the district court, the parties filed cross motions for summary judgment." See order of Appellate Court in Appendix "A". In actuality the Parties filed their motions for summary judgment far before the close of discovery and the record reflects that fact.

Third, the Appellate Court agreed with the District Court that the recorded reflected that the Respondent Officer acted properly in his actions against the Petitioner and that he was also entitled to qualified immunity from suit for damages in any event. The record did not reflect that the officer acted properly. In fact, the Petitioner and the Respondent both admitted in the

record that the Officer acted improperly when he grabbed the Respondent for no cause under the guise of his office as a deputy sheriff.

Fourth, the Appellate Court alleged that the Respondent cited no evidence that she might have been able to obtain had the magistrate judge not closed discovery. The Petitioner served an extensive request for production (D.E. 55) seeking many discoverable matters which were never answered by the Respondents whatsoever. Petitioner specifically had a pending Motion to Show Cause (D.E. 57 & 60). Had the district court ruled on this motion, one of the consequences could very well have been a favorable ruling which would have lead to the existence of video/audio tape recordings of the entire incident, or could have resulted in a default pursuant to Fed.R.Civ.P 37(b)(2)(C).The opinion by the District Court and the Appellate Court to the contrary is entirely misleading and false.

Petitioner was actively pursuing her case against the Respondents and would have won a verdict at trial were it not for the improvident intervention by the District Court in pulling the plug on Petitioner's case. Moreover, Petitioner's Motion to Show Cause against Robinson was a direct result of his belligerent refusal to answer all questions put to him in depositions regarding the grounds for a previous suspension. Robinson called the deposition "a waste of time" and refused to answer. The District Court Judge's interference and his subsequent closing of the case was prejudicial to the Petitioner and she was deprived of her right to due process and her day in Court by a jury trial of her peers.

## CONCLUSION

For the foregoing reasons the district Court erred in a gross abuse of discretion in granting the Respondent's Motion for Summary Judgment as there were many material facts in dispute between the parties, including, but not limited to, whether Robinson merely touched the Petitioner, or as she testified, he violently grabbed her deliberately placing her in excruciating pain, or whether the incident was 1 or 2 seconds as proposed by Robinson, or up to a 2 minute violent seizure as asserted by the Petitioner and also observed by Loretta, Petitioner's Mother, who witnessed the entire incident. Furthermore, Robinson and the trial Court refused to acknowledge that this incident was comprised of two separate and distinct occurrences resulting in the violent seizure of Petitioner.

Moreover, after the trial court Judge admonished the parties to behave and cooperate in the discovery process the Petitioner clearly obeyed. Robinson on the other hand, continued his uncooperative behavior in refusing to answer questions which the trial judge had previously ordered him to answer in Robinson's re-deposition. Petitioner was improperly and unfairly punished for Robinson's continued refusal to obey the trial Judge's orders.

Excluding the untimely affidavits of Nielsen and Miller, the remaining unsigned police reports were insufficient grounds for the Court to consider and with which to support the Respondent's motions for summary judgment. Therefore the District Court Judge's ruling was error and Petitioner was prejudiced thereby.

Petitioner requests that this Honorable Court enter an opinion and order remanding this case back to the trial court for full discovery and a trial by jury.

**RESPECTFULLY SUBMITTED,**

Janice Jones

Janice Jones,
Petitioner
Post Office Box 131
Reed City, Michigan 49677
(231) 745-3907

Dated:
September 14, 2002

## APPENDIX INDEX

| Appendix | Description |
| --- | --- |
| "A" | Opinion of District Court |
| "B" | Opinion of the 6th Circuit |

**APPENDIX "A"**

Opinion of District Court

UNTIED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

| | | |
|---|---|---|
| JANICE JONES, | ) | |
| | ) | |
| Plaintiff, | ) | Case No. 1:OOcv 512 |
| | ) | |
| v. | ) | Honorable Robert Holmes Bell |
| | ) | |
| DANNY PAUL ROBINSON, et al., | ) | **OPINION** |
| | ) | |
| Defendants. | ) | |
| | ) | |

This is a civil action brought by *a pro se* plaintiff pursuant to 42 U.S.C. §1983. On July 12, 1998, plaintiff was involved in a confrontation with Deputy Sheriff Danny Robinson inside the lobby of the Mecosta County Sheriff's Department offices. Plaintiff was attempting to enter an interview room from the lobby. Inside the interview room was a cat that police believed was stolen property. Plaintiff, a volunteer for an organization known as The Pet Connection, believed that this cat had been the victim of neglect by its owner. Plaintiff claims violation of her Fourth Amendment right against unreasonable seizure when Deputy Sheriff Robinson touched her in the process of preventing plaintiff from entering the interview room. Plaintiff filed this lawsuit on July 12, 2000, naming Deputy Robinson and the County of Mecosta as defendants. Plaintiff seeks an award of monetary damages in excess of $250,000.

Discovery in this case did not proceed smoothly. On May 11, 2001, the court conducted a hearing upon discovery motions by both parties. Plaintiff withdrew any claim of personal injury, mental anguish, emotional distress. or psychological suffering rather than allowing

defendants discovery into these areas. On May 16, 2001, the court issued an order precluding plaintiff from presenting any claim for personal injury, pain and suffering, emotional distress or mental anguish. Plaintiff's sole claim is limited to compensation for the deprivation of her Fourth Amendment right against unreasonable seizure.(5/16/2001 Oder, docket # 61).[1]

The matter is now before the court on cross motions for summary judgment by plaintiff (docket #22) and by defendants (docket # 27). For the reasons set forth below, defendants' motion will be granted and plaintiff's motion will be denied.

## Applicable Standard

Summary judgment is appropriate when the record reveals that there are no issues as to any material fact in dispute and the moving party is entitled to judgment as a matter of law, Fed.R.Civ. P. 56(c); *Hiney Printing Co. v. Brantner,* 243 F.3d 956, 959 (6th Cir. 2001); *Redding v. St. Edward,* 241 F.3d 530, *532* (6th Cir. 2001); *Parker v, Metropolitan Life Ins. Co.*, 121 F3d 1006, 1009 (6th Cir. 1997) (*en banc).* The standard for determining whether summary judgment is appropriate is whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,251-52(1986); *see Groner v. Golden Gate Gardens Apartments,* 250 F.3d 1039, 1043 (6th Cir. 2001); *Strouss v. Michigan Dep't of Corrections,* 250 F.3d 336, 341 (6th Cir. 2001); *Burnett v. Tyco Corp.,* 203 F.3d 980, 982 (6th Cir.), *cert. denied,* 531. U.S. 928 (2000).

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[1] Plaintiff incorporated an affidavit into her February 27,2001 brief in support of her motion for summary judgment. Plaintiff's statements in her affidavit concerning physical and emotional injuries are precluded by plaintiff's responses during her March 9, 2001 deposition, statements plaintiff made on the record at the May 11, 2001 hearing, and the court's order of May 16, 2001.

The court must consider all pleadings, depositions, affidavits, and admissions on file, and draw all justifiable inferences in favor of the party opposing the motion. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Wuthen v. General Elec. Co.*, 115 F.3d 400, 403 (6th Cir. 1997). The party moving for summary judgment bears the initial burden of pointing out to the district court that there is an absence of evidence to support the nonmoving party's case, but need not support its motion with affidavits or other materials 'negating" the opponent's claim, *Moore v. Philip Morris Companies, Inc.*, 8 F.3d 335, 339(6th Cir. 1993). Once the movant shows that 'there is an absence of evidence to support the nonmoving party' s case," the non-moving party has the burden of coming forward with evidence raising a triable issue of fact. *Celotex Corp. v. Catreu,* 477 U.S. 317, 323 (1986).

To sustain this burden, plaintiff may not rest on the mere allegations of her pleadings. Fed.R.Civ. P. 56(e); *Campbell v. Grand Trunk Western R.R.*, 238 F.3d 772, 775 (6th Cir. 2001); *Copekind v. Machulls,* 57 F.3d 476, 479 (6th Cir.1995). A party opposing a motion for summary judgment has the burden to come forth with requisite proof to support his legal claim, particularly where he has had an opportunity to conduct discovery. *See Cardamone v. Cohen,* 241. F.3d 520, 524 (6th Cir. 2001); *Noble v. Chrysler Motors Corp.*, 32 F.31 997, 999 (6th Cir.1994); *Street v. J. C. Bradford & Co.*, 886 F.2d at 1478-81. In so doing, plaintiff must set forth specific facts showing that there is a genuine issue for trial. FED. R. CIV. P.56(e); *see Mounts v. Grand Trunk Western R.R.*, 198 F.3d 578, 580 (6th Cir. 2000); *Kensu* v. *Haigh,* 87 F.3d 172, 175 (6th Cir.1996); *Brennan v. Township of Northville,* 78 F.3d 1152, 1156 (6th Cir.1996). Conclusory statements, unsupported by specific evidence to support a claim, do not meet this standard. *Kensu,* 87 F.3d at 175-76. Applying these standards, defendants' motion for summary judgement will be granted.

## Fact

The following facts are beyond genuine issue. On the afternoon of July 12, 1998, Deputy Sheriff Andrew Nielsen was dispatched to a residence on 15318 Clear Lake Drive, Big Rapids, Michigan. The Sheriff's Department had received a complaint concerning unlawful entry and stolen property. At the Clear Lake residence, Deputy Nielsen met with Steven Perkowski. Mr. Perkowski identified himself as an off-duty law-enforcement officer from Gross Isle, Michigan. Mr. Perkowski reported that he had been staying at his sister's Clear Lake residence while vacationing. Perkowski advised Deputy Nielsen that on July 8, 1998, he and his family went to Traverse City to attend the National Cherry Festival. Perkowski indicated that two family cats had been left behind at the Clear Lake residence with more than sufficient amounts of food, water, and cat litter, Perkowski and his family returned to Clear Lake on Sunday, July 12th, at approximately 2:00 p.m. They discovered a note attached to the exterior door stating, "The cat[2] in this house has been taken by The Pet Connection Humane Society." Attached to the note was a business card for The Pet Connection. Mr. Perkowski advised Deputy Nielsen that he had called the telephone number on the business card and had spoken to a woman identifying herself as Lori Jones. Perkowski stated that Ms. Jones advised him that he would not be able to retrieve his cat. The Pet Connection was holding the cat until it could be examined by a veterinarian and law enforcement action could be taken against Perkowski for cruelty to animals. Thereafter, Perkowski contacted the Mecosta County Sheriff's Department.

Deputy Nielsen's investigation on July 12 included interviews with Pauline Hagen, Kris Hagen and Liz Owczarak. The Hagens were neighbor caretakers of the house at 15318 Clear

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[2] The second cat in the residence had apparently eluded detection and had not been removed.

Lake Drive. Ms. Owczarak had been performing yard work for neighbors on the opposite side of the residence. Ms. Owczarak had apparently observed the cat inside the house and did not believe that it had sufficient food and water. Owczarak contacted the Hagens. The Hagens were in the process of entertaining guests and simply thought the cat was a wild cat that had entered the house without the owner's knowledge. The Hagens gave their key to Ms. Owczarak. She apparently entered the house, removed the cat, and left the note. Deputy Nielsen was unable to contact Ms. Owczarak on the afternoon of July 12th.

Deputy Nielsen then called The Pet Connection and spoke with a woman identifying herself as Loretta Jones. (Loretta Jones Dep. at 23, docket # 30). When questioned regarding how she came into possession of the cat, Loretta Jones indicated that the cat had been recovered by Owczarak and had been given to her. Deputy Nielsen advised Loretta Jones that the cat had not been lawfully taken by Owczarak and that the cat would have to be returned. Deputy Nielsen arranged to have Loretta Jones meet him at the Mecosta County Sheriff's Department at 5:00 p.m. that evening to transfer custody of the cat.

Plaintiff Janice Jones is the daughter of Loretta Jones. Plaintiff and her mother are affiliated with an organization known as "The Pet Connection." Plaintiff described herself as a volunteer. At her deposition, plaintiff described The Pet Connection as a humane society. Plaintiff would not answer questions regarding the location of The Pet Connection. (Plf. Dep. at 7-10, docket # 41, Ex. 1).

Plaintiff testified that on the afternoon of July 12, 1998, Loretta Jones asked plaintiff to accompany her to the offices of the Mecosta County Sheriff's Department. (Plf. Dep. at 35, 69; Loretta Jones Dep. at 4). Plaintiff stated that this cat was "her mother's case." Plaintiff testified that

she did not know how the cat came into her mothers possession. (Plf. Dep. at 35-38, 69-70, 72, 80). The Joneses transported the cat in a kennel to the Mecosta County Sheriff's Department offices.

At approximately 5:00 p.m., Deputy Nielsen met with Loretta and Janice Jones at the Sheriffs Department's office for the purpose of transferring the possession of the cat to Deputy Nielsen. Plaintiff carried the cat inside. Inside the lobby, they met with Deputy Nielsen, who directed the Joneses to an interview room. (Plf. Dep. at 36, 72-73; Loretta Jones Dep. at 4, 24). Nielsen met with the Joneses in that interview room. He photographed the cat. Deputy Nielsen related that he had spoken with Kris Hagens, and although Owczarak had obtained a key from Hagen, the police considered the cat to be stolen property. (Plf. Dep. at 75).

Plaintiff's mother asked to speak to the prosecutor about the cat's condition. (Plf. Dep. at 76). Deputy Nielsen indicated that the cat looked fine. When Deputy Nielsen explained to Janice and Loretta Jones that the cat would be returned to its owner, they became "highly agitated." Loretta and Janice Jones began to raise their voices and, according to Nielsen, became very argumentative regarding the return of the cat. (Nielsen Aff. ¶ 9, docket # 63). Plaintiff testified that she was concerned that Deputy Nielsen was not adequately addressing the issue of the cat's condition. She was concerned that Nielsen was not taking a statement from her mother about the cat. According to plaintiff, Nielsen indicated that there might be a prosecutor on call that Sunday evening and indicated that he would attempt to contact the prosecutor. (Plf. Dep. at 34-35, 38, 76, 80, 84).

Deputy Nielsen contacted his supervisor, Sergeant Dave Arnson, at the request of Loretta Jones. Sergeant Arnson responded that he was involved with an emergency call and that he would return to the office as soon as he had "cleared" the emergency. Deputy Nielsen conferred with

Deputy Danny Robinson, the Animal Control Officer for the department, concerning the results of his investigation and what action should be taken regarding the cat. (Robinson Dep. at 15, 30-33, docket # 23; Robinson Dep. at 4, 8,19, 31, docket # 58). Following this conference between Nielsen and Robinson, Robinson entered the conference room and sat down. Upon discovering Robinson's identity as the Mecosta County animal control officer, Loretta Jones became even more agitated. She demanded that Robinson immediately leave. Loretta Jones continued to shout hysterically and accused Robinson of numerous past wrongdoings and improprieties. (Nielsen Aff., ¶ 11, 12).

Deputy Robinson advised plaintiff and her mother that the cat had been improperly removed from the Clear Lake residence and was considered stolen property. Plaintiff and her mother were advised that they would not be able to take the cat with them. Deputy Robinson directed Deputy Nielsen to take possession of the Cat. (Robinson Dep. at 8, 9, 31, 36, 46, docket # 23; Plf. Dep. at 61, 77-78, 81).

At that point plaintiff and her mother left the interview room and went out into the lobby. Deputy Nielsen heard plaintiff indicate that she was going to call the Mecosta County Commissioners. (Nielsen Aff., ¶ 14). Plaintiff testified that she got up and left the room without saying anything about where she was going or who she was going to call. (Plf, Dep. at 78). When asked at her deposition why she did not simply leave the Sheriff Department offices at that point, plaintiff responded that she was waiting for some direction as to what to do next. She and her mother had not been asked by the police to leave. They were waiting for an opportunity to make a statement. (Plf. Dep. at 84).

Plaintiff testified that she left the interview room with the intent of calling Liz Oleson, the chairman of the county commission, despite the fact that it was after 5:00 p.m. on a Sunday

evening. The pay phone in the lobby lacked a telephone directory. Plaintiff asked to borrow a telephone directory from an officer seated behind the glass partition in the lobby. (Plf. Dep. at 78). Plaintiff was dissatisfied with the way Deputies Robinson and Nielsen had conducted the interview with her mother. (Plf. Dep. at 38). Plaintiff believed that police should not have stated that the cat was stolen until they had completed their investigation. (Plf. Dep. at 40). Plaintiff testified that she did not know what police should have done with the cat until their investigation was completed. (Plf. Dep at 41). Plaintiff stated that she thought it would have been "fair" to wait until Mr. Perkowski came down to the police station and personally identified the cat in the presence of the Joneses and the police. (Plf. Dep. at 42). Plaintiff ended up leaving a message on Liz Oleson's answering machine.

Deputy Robinson had entered the lobby area after plaintiff and her mother left the conference room. (Robinson Dep. at 10, docket #23). The cat remained behind in the interview room.

As plaintiff was returning from her telephone call, Deputies Robinson and Nielsen overheard plaintiff indicate that she was not going to leave without the cat. (Robinson Dep. at 21, 25, 46, docket # 23; Nielsen Aff., ¶ 14, 15). Plaintiff denies making such a statement. As plaintiff was reaching to open the interview room door handle, Robinson prevented her from opening it by putting his foot in front of the door and his hand on the door to hold it shut. (Robinson Dep. at 46). Deputy Nielsen observed plaintiff attempt to push her way past Deputy Robinson in an apparent attempt to enter the interview room and recover the cat. (Nielsen Aff., ¶17).

According to plaintiff, she saw an empty cat kennel in a corner of the lobby on her way back to the interview room. (Plf. Dep. at 85). She states that she did not hear or see Deputy

Robinson until he grabbed her right arm between the shoulder and the elbow as plaintiff was reaching for the door handle. As plaintiff spun around, her backside hit the closed door, (Plf. Dep. at 87-89). Plaintiff did not suffer any bruises or marks as a result of Deputy Robinson's touching of her arm or plaintiff's contact with the door. (Plf. Dep. at 89-90). Plaintiff denies that she was attempting to enter the room with the purpose of taking the cat. Plaintiff asserts that she was returning to the interview room to inform Robinson and Nielsen of her unsuccessful attempt to contact the chairman of the county commission and to help "facilitate" efforts to get the police to take a statement from her mother regarding the cat. (Plt. Dep. at 82-84). Upon being touched, plaintiff began screaming at Deputy Robinson to leave her alone and to get his hands off of her. Plaintiff was waving her arms up in the air. (Loretta Jones Dep. at 9, 10).

Deputy Robinson let go of plaintiff's arm. He opened the door to take a brief look inside the interview room. (Loretta Jones Dep. at 13). Robinson saw plaintiff put her hand inside the doorway and wrap her fingers around the edge of the door. (Robinson Dep. at 25, 44, docket # 23). Defendant Robinson grasped plaintiff's right forearm and pulled plaintiff's hand clear because Robinson did not want the door to close on plaintiff's hand. This physical contact lasted one to two seconds. (Robinson Dep. at 10, 14, 47, 48 docket # 23; Robinson Dep. at 25, docket # 58). Deputy Robinson testified that the only time he touched plaintiff was to remove her hand from the door. (Robinson Dep. at 14, docket # 23; Robinson Dep. at 25, docket # 58), but construing the facts in the light most favorable to plaintiff, the court assumes two separate touchings. At her deposition, plaintiff acknowledged putting her hand inside the door and that Deputy Robinson removed it without injuring her. (Plf. Dep. at 59). Plaintiff denied that she was attempting to gain entry to the room. Plaintiff testified that after the initial touch by Robinson, she felt faint. She

reached out and grabbed onto the edge of the door to regain her balance. (Plf. Dep. at 63, 65). Plaintiff pulled away from Robinson and began screaming for the police. Deputy Robinson stood up against the interview room's door, preventing plaintiff from opening it. (Robinson Dep. at 47, docket # 23).

Big Rapids Public Safety Officer Brian Miller heard a loud disturbance in the lobby area.. In the lobby, he saw Deputies Robinson and Nielsen, He also saw plaintiff and Loretta Jones. Deputy Robinson was standing near the door to the interview room. Plaintiff was attempting to gain entry into the interview room. (Miller aff., ¶ 2-8, docket # 64). Officer Miller approached plaintiff and her mother. When Officer Miller spoke to plaintiff, plaintiff indicated that she wanted to file assault charges against Deputy Robinson. Officer Miller asked plaintiff to identify where Deputy Robinson had touched her. Plaintiff indicated that it had been on her arm. Officer Miller requested to see her arm. Plaintiff pulled up her sleeve, (Loretta Jones Dep. at 16). Officer Miller advised plaintiff that he could not see any redness or any other indication of the purported assault. (Miller Aff.,¶ 9-10).

Plaintiff responded by yelling louder and creating a disturbance in the lobby. Plaintiff went to use the pay phone again, but Officer Miller prevented her from doing so. (Plf, Dep. at 66- 67). Officer Miller ordered plaintiff to cease her screaming and to leave the Mecosta County Sheriff's Department immediately. When the screaming continued, Officer Miller advised plaintiff that if she did not discontinue her behavior she would be arrested as a disorderly person. After a few additional verbal outbursts, plaintiff and her mother left the building. (Miller Aff. ¶ 9-1 1; Nielsen Aff., ¶ 21-24).

Plaintiff filed this lawsuit on July 12, 2000, exactly two years after her encounter with Deputy Robinson.

## Discussion

1.

Plaintiff seeks monetary damages against defendant Robinson for an alleged violation of her Fourth Amendment right against unreasonable seizures. Defendant Robinson seeks summary judgment on the basis of, among other things, qualified immunity. In *Harlow v. Fitzgerald*, 457 US. 800 (1982), the Supreme Court held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. The standard to be applied in deciding a claim of qualified immunity is one of objective reasonableness. *Id.* The question whether qualified immunity attaches to an official's actions is a purely legal issue for the trial court. *See Summar v. Bennett*, 157 F.3d 1054, 1057 (6th Cir. 1998); *Dominque v. Telb*, 831 F.2d 673, 677 (6th Cir. 1987).

The Supreme Court's recent decision in *Saucier v. Katz*, 121 S. Ct. 2151, 2155-36 (2001). emphasized that the defense of qualified immunity must be considered in proper analytical sequence.

> In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence. Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. Qualified immunity is an entitlement not to stand trial or face other burdens of litigation. The privilege is an immunity from suit rather than a mere defense to liability; and like an absolute liability, it is effectively lost if a case is erroneously permitted to go to trial. As a result, we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.

121 S. Ct. at 2155-56 (citations omitted). The initial inquiry must be whether the plaintiff has alleged and supported with evidence facts showing that defendant Robinson's conduct violated a constiutional right. 121 S. Ct. at 2156.

The Fourth Amendment states that, "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated...." U.S. Const. am IV. This constitutional right is enforced against the states through the Due Process Clause of the Fourteenth Amendment. *See Mapp* v. *Ohio*, 367 U.S. 643, 655 (1961). In *Graham* v. *Connor*, 490 U.S. 386 (1989), the Supreme Court held that a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other seizure of his or her person is to be evaluated under the Fourth Amendment's objective reasonableness test. 490 U.S. at 388. Plaintiff was not arrested. She was not the subject of an investigatory stop. Therefore, the initial issue before this court is whether plaintiff was subjected to a Fourth Amendment "seizure" of her person.

The Supreme Court has held that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that [s]he was not free to leave." *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980); *see also Florida v. Bostick*, 501 U.S. 429, 439 (1991). Plaintiff made no allegations nor supported with evidence any claim that defendant Robinson prevented her from leaving the station on July 12, 1998. Police actually encouraged plaintiff to leave. Robinson simply precluded plaintiff from entering the police station's interview room within which police had secured a cat that was apparently stolen property. Police had a duty to the cat's owner not to let plaintiff take the cat. Deputy Robinson used minimal force, causing no injury to

plaintiff in the process of preventing plaintiff from entering the room. Under these circumstances, plaintiff was never the subject of a "seizure" of her person within the meaning of the Fourth Amendment.

Even assuming *arguendo* that Deputy Robinson's touching of plaintiff could be considered a Fourth Amendment seizure, his actions did not rise to the level of an "unreasonable" seizure. Determining whether the force used by a law enforcement officer to effect a particular seizure is "reasonable" under the Fourth Amendment requires "a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." 490 U.S. at 396 (quoting *United States v. Place*, 462 U.S. 696,703 (1983). The "reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. With respect to a claim of excessive use of force, the same standard of reasonableness at the moment applies: 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers' violates the Fourth Amendment. The calculus of the reasonableness must embody allowance for the fact that officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation." 490 U.S. at 396-97; *see Neague v. Cynkar*, 258 F.3d 504 (6th Cir. 2001).

The cat was considered stolen property. It appeared to Deputy Robinson that plaintiff was determined to enter the room, grab the cat and leave with it. Robinson used minimal force. Plaintiff suffered no injuries as a result of the incident. Defendant Robinson is entitled to judgment in his favor as a matter of law because any temporary seizure of plaintiff's person, if there was a seizure at all, was not unreasonable.

Even assuming that plaintiff had supported a viable Fourth Amendment claim, defendant Robinson would be entitled to summary judgment on the basis of qualified immunity. Under the doctrine of qualified immunity, government officials may violate a person's constitutional rights and nevertheless be shielded from a damage award if they could not reasonably be expected to know that the Constitution prohibited their conduct. In determining whether an official is entitled to this immunity, the court must decide whether the official reasonably could have thought that his actions were consistent with the rights that plaintiff claims have been violated. The Sixth Circuit applies a two-part test for determining whether a government official is entitled to the defense of qualified immunity: (1) whether the plaintiff has shown a violation of a constitutionally protected right; and if so, (2) whether the right was clearly established such that a reasonable official would have understood that his behavior violated that right. *See Key* v. *Grayson*, 179 F.3d 996 (6th Cir. 1999); *Summar v. Bennett*, 157 F.3d at 1058. The absence of a violation of a constitutionally protected right was addressed earlier in this opinion. In this section, the pivotal issue is whether the right plaintiff claims was "clearly established" such that a reasonable official in defendant Robinson's position would have understood that his behavior violated that right. The court must focus on whether, at the time defendant acted, the right asserted was "clearly established" by the decisions of the Supreme Court or the Sixth Circuit. *See Walton* v. *City of Southfield*, 995 F.2d 1331, 1335-36 (6th Cir. 1993); *Garvie* v. *Jackson*, 845 F.2d 647, 649 (6th Cir. 1988). In rare instances, it is possible for decisions of other courts to clearly establish the law. *Key*, 179 F.3d at 1000. "If reasonable officials could disagree on the issue, immunity should be recognized." *Id.* "For qualified immunity to be surrendered, pre-existing law must dictate, that is truly compel (not just suggest or allow to raise a question about), the conclusion for every-like situated, reasonable

government agent that what the defendant is doing violates federal law in the circumstances." *Saylor v. Board* of *Educ.*, 118 F.3d 507, 514 (6th Cir. 1997). "The burden of convincing a court that the law was clearly established 'rests squarely with the plaintiff.' " *Key* 179 F.3d at 1000 (quoting *Cope v. Hettsley,* 128 F.3d 452, 459 (6th Cir. 1977).

Plaintiff argues that it was clearly established that "an arrest without probable cause to believe that a crime had been committed violated the Fourth Amendment." (Plt. Brief at 20). This argument simply misses the mark. Plaintiff was never arrested on July 12, 1998. Police officers have authority to maintain order inside the police station and prevent individuals from taking property in police possession which the police have reason to believe may have been stolen from its owner. The court is unable to locate any Supreme Court or Sixth Circuit precedent finding a Fourth Amendment violation under remotely analogous facts. The court finds that defendant Robinson is entitled to judgment in his favor on the alternative basis of qualified immunity.

**2.**

Plaintiff asserts that defendant County of Mecosta should be held vicariously liable for defendant Robinson's actions. A county is liable only for acts done by its agents or employees in furtherance of county policy, custom or practice. See *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978); *Thompson v. Ashe,* 250 F.3d 399, 409 (6th Cir. 2001), Plaintiff has presented no evidence that defendant Robinson's actions were the result of any county policy, custom or practice. Having found no violation of plaintiff's Fourth Amendment rights, the court cannot hold the county vicariously liable. *See Kiemencic* v. *Ohio State Univ.*, No. 98-3951, ___F.3d ___, 2001 WL 985116, at * 5 (6th Cir. Aug. 27, 2001) ("Section 1983 actions against institutions

are not sustainable where an employee did not commit an underlying violation."). Accordingly, defendant County of Mecosta is entitled to judgment in its favor as a matter of law.

## Conclusion

Defendants' motion for summary judgment will be granted and judgment will enter in their favor.

Dated: September 5, 2001

s/Robert Holmes Bell
Chief United States District Judge

**APPENDIX "B"**

Opinion of the 6th Circuit

No. 01-2412

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| JANICE JONES, | ) | FILED |
| | ) | JUN 17 2002 |
| Plaintiff-Appellant, | ) | LEONARD GREEN, Clerk |
| | ) | |
| v. | ) | ORDER |
| | ) | |
| DANNY PAUL ROBINSON and MECOSTA, COUNTY, | ) | |
| | ) | |
| Defendants-Appellees. | ) | |
| | ) | |

Before: MARTIN, Chief Circuit Judge; KEITH and KENNEDY, Circuit Judges.

Janice Jones appeals a district court grant of summary judgment for defendants in this civil rights action filed under 42 U.S.C. § 1983. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Jones filed her complaint in the district court alleging that the individual defendant Mecosta County Deputy Sheriff Danny Robinson violated her Fourth Amendment right to remain free from unreasonable seizure when he forcefully grabbed her during a confrontation in the offices of the Mecosta County Sheriff. Following the close of the discovery period established by the district court, the parties filed cross motions for summary judgment. The district court denied plaintiff's motion, granted defendants' motion and entered judgment accordingly. Plaintiff filed a timely notice of appeal.

On appeal, plaintiff contends that a genuine issue of material fact remains with respect to her Fourth Amendment claim against the individual defendant and contends that the district court erred

in closing the discovery period and in considering two affidavits submitted by defendants beyond the discovery period. Plaintiff also moves to strike these affidavits on appeal. Defendants respond that the district court's judgment was proper. Upon de novo review, *see Brooks v. American Broad. Cos.*, 932 F.2d 495, 500 (6th Cir. 1991), we will affirm the judgment essentially for the reasons stated by the district court in its opinion filed September 5, 2001.

The district court properly analyzed and rejected plaintiff's Fourth Amendment claim. Generally, the Fourth Amendment prohibits unreasonable seizures and the use of excessive force during an arrest or investigatory stop. *See Graham v. Connor*, 490 U.S. 386, 394 (1989). However, plaintiff was not arrested or subjected to an investigatory stop in this case. Even if defendant "stopped" plaintiff, the district court properly performed a "careful balancing of the 'nature and intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake" in determining hether a police officer's use of force was "reasonable" under the circumstances. *Id.* (quoting *Tennesee v. Garner*, 471 U.S. 1. 8 (1985)). The inquiry is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397. The focus is on the "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" ld. at 396. Here, the evidence of record supports the district court's conclusion that defendant acted properly. Moreover, the district court correctly concluded that defendant is entitled to qualified immunity from suit for damages in any event.

Finally, plaintiff's claims regarding discovery lack merit. The scope of discovery lies within the sound discretion of the trial court and discovery rulings are reviewed only for abuse of discretion. *See Lavado v. Keohane*, 992 F.2d 601, 604 (6th Cir. 1993). Abuse of discretion is defined as a firm and definite conviction that the trial court committed a clear error of judgment. *See Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989). As noted by the district court, "(d)iscovery in this case did not proceed smoothly." The magistrate judge properly closed discovery at the previously scheduled time after concluding that both parties committed discovery abuses. Plaintiff cites no evidence that she might hate been able to obtain had the magistrate judge

not closed discovery. Moreover, plaintiff's contention that the district court improperly considered two affidavits submitted by defendants beyond the discovery period lacks merit because parties are permitted to obtain affidavits in support of a motion for summary judgment outside the discovery period and process.

For the foregoing reasons, the motion to strike defendants affidavits is denied, and the district court's judgment is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

S/Leonard Green, Clerk

# OPPOSITION

# BRIEF

Supreme Court, U.S.
FILED
OCT 18 '02

No. 02-438

IN THE

# Supreme Court of the United States

JANICE JONES,

*Petitioner,*

*v.*

DANNY PAUL ROBINSON,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the Court of Appeals properly affirmed the District Court's grant of summary judgment for Respondent Danny Robinson on the basis of qualified immunity where he did not violate Petitioner's clearly established Fourth Amendment right?

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## STATEMENT OF FACTS

This case arises out of a dispute between the Petitioner, Janice Jones and law enforcement officers regarding the unlawful removal of a cat from a family's home. On the afternoon of July 12, 1998, Deputy Sheriff Andrew Nielsen was dispatched to a residence on 15318 Clear Lake Drive, Big Rapids, Michigan, to investigate a complaint regarding unlawful entry and stolen property. (R. 63, Affidavit of Nielsen.) Upon arrival at the residence, Deputy Nielsen met with Steven Petrowski, who identified himself as an off-duty law enforcement officer from Grosse Ile, Michigan. (R. 27, Response and Counter-Motion for Summary Judgment, Exhibit 1, Incident Report by Nielsen.) Mr. Petrowski explained that he had been vacationing at 15318 Clear Lake Drive, which is his sister's residence. *Id.* He indicated that on July 8, 1998, he and his family left the residence for the Traverse City area to attend the Cherry Festival. Petrowski stated that two family cats were left behind with more than sufficient amounts of food, water and cat litter. *Id.* However, when he and the family returned on July 12th, at approximately 2:00 p.m., he discovered a note attached to the outside of the residence, stating, "The cat in this house has been taken by the Pet Connection Humane Society." Attached to the handwritten note was a business card that gave the telephone number and address. Petrowski called the Pet Connection and spoke with a woman who identified herself as Lori Jones. Ms. Jones advised that a person known as "Liz Owczarak" had taken the cat from the residence and given it to the Pet Connection. *Id.* Lori Jones told Petrowski that he would not be able to retrieve his cat and that the Pet Connection would hold it until it could be examined by a veterinarian and law enforcement action could be taken against him for cruelty to animals. *Id.*

Upon further investigation, Deputy Nielsen determined that Liz Owczarak observed a cat inside the house and she obtained the key from the Hagens, the neighbor caretakers of the house. (R. 27, Exhibit 1.) Ms. Owczarak had told the Hagens that she believed that a wild cat had entered the residence without the owner's knowledge. Kris Hagen, who was busy entertaining guests at the time, gave the key to Ms. Owczarak, who removed the cat from the house and left the note. *Id.*

Deputy Nielsen subsequently called Lori Jones, believed to be the operator of the Pet Connection. When asked how she came into possession of the cat, Lori Jones stated that the cat had been given to her by Owczarak, who recovered it from the residence. (R. 27, Exhibit 1.) Deputy Nielsen advised Lori Jones that Owczarak had unlawfully taken the cat and that it would have to be returned to its rightful owners. He advised Lori Jones to meet with him at the Mecosta County Sheriff's Department at 5:00 p.m. to transfer custody of the cat. *Id.*

On the afternoon of July 12, 1998, Lori Jones, accompanied by her daughter, Petitioner, Janice Jones, went to the offices of the Mecosta County Sheriff's Department for the purpose of transferring possession of the cat to Deputy Nielsen. (R. 63, Nielsen Affidavit.) The cat was brought in a kennel. (Plaintiff's Dep. at p. 36.) Deputy Nielsen met with the Joneses in an interview room located near the lobby of the building. *Id.* He photographed the cat. *Id.*

Upon being advised that the cat was the property of the family that was staying at the Clear Lake Drive address and would have to be returned to its owner, Plaintiff and Lori

Jones became highly agitated. (R. 63, Nielsen Affidavit, ¶9.) They began to raise their voices and became very argumentative regarding the return of the cat. *Id.*

At the request of Lori Jones, Deputy Nielsen contacted his supervisor, Sgt. Dave Arnson, who stated that he would come to the Sheriff Department's Office as soon as he cleared the emergency call he was involved with. (Nielsen Affidavit, ¶10.) Meanwhile, Respondent Deputy Robinson, the animal control officer with whom Deputy Nielsen had conferred on this matter earlier in the day, arrived in the conference room. (Nielsen Affidavit, ¶11.)

Upon discovering Deputy Robinson's identity, Lori Jones became even more agitated and demanded that he immediately leave. (Nielsen Affidavit, ¶12.) She continued to shout hysterically and accused Deputy Robinson of numerous past wrongdoings and improprieties. (Nielsen Affidavit, ¶¶11, 12.)

Petitioner and Lori Jones left the interview room to use the telephone in the lobby to call the Mecosta County Commissioners. (Nielsen Affidavit, ¶14.) Upon returning from the lobby, Petitioner stated that she was not leaving the Sheriff's Department without the cat. (Nielsen Affidavit, ¶15.) Deputy Robinson advised Plaintiff that she would not be taking the cat with her, as the cat was being returned to its owner. *Id.* At that time, Petitioner reached over, grabbed the door and tried to open the door. (R. 23, Dep. of Robinson, 12/4/00, p. 46.) Deputy Robinson prevented her from opening the door by putting his foot in front of the door and his hand on the door to hold it shut. *Id.* Petitioner then attempted to push her way past Deputy Robinson in an apparent attempt to enter the interview room and recover the cat. (Nielsen Affidavit, ¶17.)

Petitioner testified that as she was reaching for the door handle, Deputy Robinson suddenly grabbed her right arm between the shoulder and the elbow. (Plaintiff's Dep., pp. 86-87.) As Petitioner spun around, her backside hit the closed door. (Plaintiff's Dep. at 87-89.) Petitioner did not suffer any bruises or marks as a result of Deputy Robinson's touching of her arm or Petitioner's contact with the door. (Plaintiff's Dep., pp. 89-90.) Subsequently, Deputy Robinson saw Petitioner put her hand inside the doorway and wrap her fingers around the edge of the door. (R. 23, Robinson's Dep., p. 27.) Robinson grabbed Plaintiff's right forearm and removed her hand from the door to prevent the door from closing on Plaintiff's hand. (R. 23, pp. 13, 47-48.) This physical contact lasted 1-2 seconds. (R. 23, p. 47.) Petitioner pulled her hand away and Robinson let go of her hand. *Id.*

Petitioner began screaming for the police. (Robinson's Dep. p. 47.) Big Rapids Public Safety Officer Brian Miller heard a loud disturbance in the lobby area. (R. 64, Affidavit of Miller, ¶4.) Officer Miller saw Deputies Robinson and Nielsen. He also saw Plaintiff and Lori Jones. Deputy Robinson was standing near the door to the interview room. Petitioner was attempting to gain entry into the interview room. (Miller Affidavit ¶¶2-8.) Petitioner told Officer Miller that she wanted to file assault charges against Deputy Robinson. Petitioner indicated that she had been grabbed on her arm. Officer Miller then requested to see her arm. Petitioner pulled up her sleeve. Officer Miller advised Petitioner that he could not see any redness or any other indication of the alleged assault. (Miller Affidavit ¶9.) Petitioner responded by yelling louder and creating a disturbance in the lobby. Officer Miller advised Petitioner

and Lori Jones that if they did not leave the building, they would be arrested for disorderly conduct. (Miller Affidavit ¶¶10, 11.)

As a result of this incident, Petitioner brought this action under 42 U.S.C. § 1983 against Deputy Robinson and the County of Mecosta alleging that the Respondents violated her Fourth Amendment right against unreasonable seizure. Following discovery, Respondents filed a Motion for Summary Judgment. The District Court granted summary judgment for Respondent Robinson on the grounds that he acted properly and that he was entitled to qualified immunity. With respect to the Respondent county, the District Court determined that it was not liable because Petitioner presented no evidence that Robinson's actions were the result of county policy, custom or practice. On appeal, the Court of Appeals for the Sixth Circuit affirmed the grant of summary judgment for the Respondents.

## REASONS FOR DENYING THE PETITION

### THIS COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT FOR PETITIONER ROBINSON ON THE BASIS OF QUALIFIED IMMUNITY WHERE HE DID NOT VIOLATE THE PETITIONER'S CLEARLY ESTABLISHED FOURTH AMENDMENT RIGHT.

Qualified immunity shields government officials performing discretionary functions from civil liability under § 1983 insofar as their conduct does not violate clearly-established statutory or constitutional rights of which a

reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). The defense of qualified immunity is based upon public policy which recognizes:

> [T]he necessity of permitting officials to perform their official functions free from the threat of suits for personal liability. This official immunity apparently rested, in its genesis, on two mutually-dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgement required by the public good.

*Scheuer v. Rhodes*, 416 U.S. 232, 239-240, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974).

When a defendant claims qualified immunity, "a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive." *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001).

The Court in *Saucier*, *supra*, clarified that, in order to assess whether an official is entitled to immunity from suit, the Court must engage in a two-part, sequential analysis: First, the Court must determine whether Plaintiff has alleged facts which, when taken in the light most favorable to her, show that the Defendant official's conduct violated a constitutional right; if the answer to the first question is in the affirmative, the Court must then determine whether that

right was clearly established such that a reasonable official, at the time the act was committed, would have understood that his behavior violated that right. *Id.*, *Comstock v. McCrary*, 273 F.3d 693, 702 (6th Cir. 2001).

The threshold inquiry in the qualified immunity analysis is whether the Petitioner has alleged facts showing that Respondent Robinson's conduct violated a constitutional right.

Count I of Petitioner's Complaint alleges a violation of Plaintiff's Fourth Amendment right against unreasonable seizure.

The Fourth Amendment provides, in relevant part, that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. Const. Amend.

First, the Petitioner must show that she has been "seized" within the meaning of the Fourth Amendment. Second, the Petitioner must show that the force used was unreasonable under the Fourth Amendment. *Cameron v. City of Pontiac*, 813 F.2d 782, 784 (6th Cir. 1987.) "The reasonableness of the seizure or method of seizure cannot be challenged under the Fourth Amendment unless there was completed seizure." *Id.* citing *Dallas v. McKee*, 801 F.2d 200, 203 (6th Cir. 1986).

The Court in *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 870, 64 L. Ed. 2d 497 (1980), held that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."

In *Fuller v. Vines*, 36 F.3d 65 (9th Cir. 1994), the Court held that the allegation that the officer pointed a gun at the Plaintiff's head did not constitute a "seizure" because Plaintiff was free to leave. The Court concluded:

> In James, Jr.'s affidavit, the most that is alleged is the "Officer Peixoto pointed his gun directly at my head and said profane remarks to me." There is no contention that he was arrested or that his liberty was restrained, other than that he was not free to attack the officers. The officers contend that this action with the gun was necessary in order to keep James, Jr. from attacking them. Although the Fullers argue that this was unnecessary, ***there is no contention that the officers indicated James, Jr. was not free to leave. In order to constitute a seizure of the person, the action of the officer must be a restraint of liberty such that the person reasonably believes he is not free to leave.*** *United States v. Mendenhall, [supra]*. It is not sufficient to constitute a seizure when the restraint is only that the person is not free to attack the officers.

*Id.* at 68. (Emphasis added.)

As in *Fuller*, *supra*, in this case there was no "seizure" because Petitioner was free to leave. Petitioner alleged that Respondent Robinson grabbed her arm and shoved her forcefully against the door. Deputy Robinson contends that he grabbed Petitioner's arm to prevent her from gaining entry into the interview room to take the stolen cat and/or to prevent the door from closing on her hand. Even though Petitioner denies Respondent's contentions, Petitioner has made no

allegation that Deputy Robinson prevented her from leaving the station on July 12, 1998. As the District Court correctly observed, the police actually encouraged Petitioner to leave. The only restraint placed upon Petitioner's liberty was that she was not free to enter the interview room to take the stolen cat away. Such restraint is insufficient to constitute a "seizure" in violation of the Fourth Amendment.

Nor can the alleged seizure, if any, be considered unreasonable. In *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 28 (1989), the Court held that any claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop or other seizure of a person must be evaluated under the Fourth Amendment's "reasonableness" standard.

> The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers violates the Fourth Amendment. The calculus of the reasonableness must embody allowance for the fact that officers are often forced to make split-second judgements — in circumstances that are tense, unsettling, and rapidly evolving — about the amount of force that is necessary in a particular situation.

490 U.S. at 396-397.

Additionally, determining whether the force used by a law enforcement officer to effect a particular seizure is

"reasonable" under the Fourth Amendment requires "a careful balance" of "the nature and quality of the intrusion on the individual's Fourth Amendment interest against the countervailing governmental interest at stake." 490 U.S. at 396.

In this case, Petitioner was determined to enter the interview room to take away the cat which the police had determined to be stolen property. Respondent had the duty to protect the property rights of a citizen. He used minimal force and did not cause any injury to Petitioner. Under the circumstances, any alleged "seizure" was not unreasonable. Therefore, Petitioner's constitutional right against unreasonable seizure was not violated, and Respondent was properly granted qualified immunity.

Assuming arguendo that Respondent Robinson's actions did violate the Petitioner's Fourth Amendment right against unreasonable seizure, Respondent was entitled to summary judgment on the basis of qualified immunity because Petitioner failed to establish that the alleged constitutional right violated was clearly established.

The second inquiry in the qualified immunity analysis is whether the right was clearly established.

> If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on the favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established.

*Saucier*, 121 S. Ct. at 2156.

The Court noted that the second inquiry must "be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* Thus, ***"the relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."*** *Id.* (Emphasis added.) "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id.* As the Sixth Circuit explained, the "pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what Defendant is doing violates federal law in the circumstances." *Cope v. Heltsley*, 128 F.3d 452, 459 (6th Cir. 1997), quoting *Saylor v. Bd of Ed of Harlan County*, 118 F.3d 507, 512 (6th Cir. 1997).

In *Saucier*, *supra*, the petitioner officer arrested a protestor (the respondent) and shoved him into a van. Respondent sued the officer, alleging that the officer violated his Fourth Amendment rights by using excessive force to arrest him. The Court, in holding that the officer was entitled to qualified immunity because the officer did not violate a clearly-established right stated:

> In the circumstances presented to this officer . . . neither respondent nor the Court of Appeals has identified any case demonstrating a clearly-established rule prohibiting the officer from acting as he did, nor are we aware of any such rule. Our conclusion is confirmed by the uncontested fact that the force was not so excessive that respondent suffered hurt or injury. On these premises,

> petitioner was entitled to qualified immunity and the suit should have been dismissed at an early stage in the proceedings.

121 S. Ct. at 2160.

Similarly, in this case, Petitioner has cited no case that would clearly dictate to Respondent that his action in these circumstances which did not result in injury to Petitioner, was unlawful. Therefore, the Petitioner's case was properly dismissed on the basis that Respondent was entitled to qualified immunity.

Petitioner argues that the District Court and the Court of Appeals erred in granting summary judgment to Respondent because of the existence of factual disputes. Petitioner's argument manifests a fundamental misunderstanding of the Qualified Immunity doctrine. Under the doctrine, Respondent is still entitled to qualified immunity even if he violated Petitioner's constitutional rights. The question is whether the challenged conduct is objectively reasonable in light of clearly established law. The Court is *Saucier*, *supra* rejected the Ninth Circuit holding that factual disputes as to the excessive force claim required the denial of summary judgment based on qualified immunity. The Court stated:

> The approach the Court of Appeals adopted — to deny summary judgment any time a material issue of fact remains on the excessive force claim — could undermine the goal of qualified immunity to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. *Harlow v. Fitzgerald*, 457

> U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). If the law did not put the officer on notice that his conduct would be clearly unlawful summary judgment based on qualified immunity is appropriate. See *Malley v. Briggs*, 475 U.S. 335, 341, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986) ("qualified immunity protects all but the plainly incompetent are those who knowingly violate the law").

121 S. Ct. at 2156-2157.

In addition, the officer's reasonable, but mistaken belief as to the facts would not defeat the defense of qualified immunity. Thus, the Petitioner's argument regarding the existence of genuine issue of material fact is unavailing.

There is also no merit to Petitioner's argument that Respondent improperly submitted Affidavits in support of the motion for summary judgment after discovery was closed. There is absolutely no legal basis for Petitioner's assertion that affidavits in support of motions for summary judgment cannot be obtained outside the discovery period.

## CONCLUSION

For the foregoing reasons, Respondent[1] respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari and affirm the decision of the Court of Appeals for the Sixth Circuit.

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1. Petitioner has abandoned her § 1983 claim against Respondent Mecosta County since she fails to address the claim in her brief.